Charles Grenier Sdn Bhd v Lau Wing Hong

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-425-94
ANUAR CJ (MALAYA), MOHD AZMI FCJ AND GOPAL SRI RAM JCA
20 SEPTEMBER 1996

Contract *— Formation — Contract — Whether agreement to make agreement resulted in a contract — Whether answer depended on intention of parties which was reflected by correspondence exchanged between them and objective aim of transaction*

Contract *— Formation — Contract for sale of property — Parties entered agreement to make sale and purchase agreement of property — Parties to transaction, property price and essential terms identified — Correspondence between parties did not reflect intention of parties that there should be no concluded contract until a formal sale and purchase agreement had been executed — Whether an 'open contract' — Whether enforceable as if it was embodied in document with all attendant solemnity — Whether court could imply terms into contract for sale to give it effect*

Contract *— Frustration — Sale and purchase of property — Vendor entered contract for sale of property with purchaser — Third party claimed vendor had earlier entered agreement to sell property to them — Application for specific performance — Third party thereafter obtained ex parte injunction restraining vendor from entering into any agreement for sale of property to any other person — Whether contract between vendor and purchaser had been frustrated*

The appellant ('the vendor'), who was the registered proprietor of two shophouses ('the property'), engaged the services of a firm of estate agents ('the estate agents') to search for a purchaser for the property at the price of RM450,000. In November 1989, the estate agents found the respondent as the purchaser ('the purchaser'). The estate agents communicated with the vendor's solicitors, who accepted the purchaser's offer of RM450,000 on behalf of the vendor, with the condition, inter alia, that the purchaser pay a 10% deposit by 28 November 1989 and the balance purchase price within three months from execution of the sale and purchase agreement ('the first letter'). On 28 November 1989, the estate agents sent the 10% deposit in the form of a cheque to the vendor's solicitors, together with a letter confirming the purchaser's offer to purchase the property 'subject to the sale and purchase agreement' ('the second letter'). However, on 29 November 1989, a third party had caused to be issued a writ from the High Court against the estate agents and the vendor seeking, inter alia, specific performance of an agreement made on either 24 or 26 November 1989 for the sale of the property to them. The third party had also obtained an ex parte injunction restraining the vendor from entering into any agreement for the sale of the property to any other person. The vendor took the position that the agreement it had with the purchaser, if any, had been rendered impossible of performance, and informed the purchaser accordingly. On 29 October 1994, he took out a summons claiming a declaration to the effect that if there was an agreement between it and the purchaser, such agreement had been frustrated by the grant of the injunction. The

High Court judge dismissed the application. The vendor appealed to this court, contending that the agreement to sell was subject to contract, and that there was no contract concluded between the purchaser and him. It was argued that the phrase 'subject to the sale and purchase agreement' appearing in the first letter showed that the parties were still negotiating, and that there were many terms which they had not agreed upon. The issues before the court were: (i) whether there was a valid and enforceable agreement between the vendor and the purchaser; and (ii) if the answer was in the affirmative, whether that agreement had been frustrated by the grant of the injunction in question.

Held, dismissing the appeal:

(1) An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract (see p 335C).

(2) The law leans in favour of upholding bargains and not in striking them down (see p 335E–F); *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 followed.

(3) The court had examined the two letters that passed between the parties, and was unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, the court found their objective intention to be travelling in quite the opposite direction. They had identified the parties to the transaction, the property, the price and the terms they considered essential with sufficient clarity. Such an agreement was termed an 'open contract'. It was enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will, acting out of necessity, imply terms into the contract for sale in order to make it work (see pp 335I and 336A–C); *Liverpool City Council v Irwin* [1977] AC 239 and *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300 followed.

(4) The phrase 'subject to the sale and purchase agreement' relied on by the vendor did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it was, when read in the context of the correspondence and the objective aim of the transaction, indicative of an intention to merely formalize the agreement already concluded between the parties (see p 336E).

(5) Since the injunction came after the contract between the vendor and the purchaser had been made, it had no effect upon the transaction that had already been concluded. Further, there was material in the record provided that reasonably supported the inference that the purchaser was really an innocent party who had entered into a contract with the vendor without any notice whatsoever of the alleged transaction on the basis of which the injunction was obtained. In these circumstances, there was no impediment to an application by the vendor to have the injunction dissolved so that the sale to the purchaser may be proceeded without any further delay (see p 336G).

[Bahasa Malaysia summary

Perayu ('penjual'), yang merupakan tuan punya berdaftar dua buah rumah kedai ('harta tersebut'), telah menggaji perkhidmatan sebuah firma ejen harta tanah ('ejen harta tanah') bagi mendapatkan pembeli untuk harta tersebut pada harga RM450,000. Dalam bulan November 1989, ejen harta tanah telah menjumpai penentang sebagai pembeli ('pembeli'). Ejen harta tanah telah berkomunikasi dengan peguamcara penjual, yang menerima tawaran pembeli sebanyak RM450,000 bagi pihak penjual, dengan syarat, antara lain, bahawa pembeli membayar deposit sebanyak 10% pada 28 November 1989 dan baki harga belian dalam tempoh tiga bulan dari pelaksanaan perjanjian jual beli ('surat pertama'). Pada 28 November 1989, estet harta tanah telah mengirim deposit 10% dalam bentuk cek kepada peguamcara penjual, bersama dengan sepucuk surat yang mengesahkan tawaran pembeli untuk membeli harta tersebut 'tertakluk kepada perjanjian jual beli' ('surat kedua'). Namun demikian, pada 29 November 1989, pihak ketiga telah menyebabkan suatu writ dikeluarkan dari Mahkamah Tinggi terhadap ejen harta tanah dan penjual yang meminta, antara lain, pelaksanaan spesifik suatu perjanjian yang dibuat pada 24 atau pun 26 November 1989 untuk jualan harta tersebut kepada mereka. Pihak ketiga tersebut juga telah memperolehi injunksi ex parte yang menahan penjual daripada mengikat sebarang perjanjian untuk jualan harta tersebut kepada mana-mana orang yang lain. Penjual berpandangan bahawa perjanjiannya dengan pembeli, jika ada pun, telah menjadi mustahil untuk dilaksanakan, dan ekoran itu telah memberitahu pembeli mengenai perkara ini. Pada 29 Oktober 1994, dia telah mengambil suatu saman yang menuntut deklarasi bahawa jika pun terdapat suatu perjanjian antaranya dengan pihak pembeli, perjanjian sedemikian telah pun dikecewakan oleh pemberian injunksi. Hakim Mahkamah Tinggi telah menolak permohonan tersebut. Penjual merayu kepada mahkamah ini, dengan berhujah bahawa perjanjian untuk menjual adalah tertakluk kepada kontrak, dan bahawa tiadanya kontrak yang telah diikat antara pembeli dengan dirinya. Ia dihujahkan bahawa ungkapan 'tertakluk kepada perjanjian jual beli'

yang muncul dalam surat pertama menunjukkan bahawa pihak-pihak masih berunding, dan bahawa adanya beberapa terma yang belum dipersetujui. Isu-isu yang harus dipertimbangkan oleh mahkamah adalah: (i) sama ada atau tidak terdapat suatu perjanjian yang sah dan boleh dikuatkuasakan antara penjual dan pembeli; dan (ii) jika jawapan adalah 'ya', sama ada atau tidak perjanjian itu telah dikecewakan menerusi pemberian injunksi yang berkenaan.

Diputuskan, menolak rayuan:

(1) Suatu perjanjian untuk mengikat perjanjian tidak mewujudkan suatu kontrak. Ia merupakan tugas mahkamah dalam setiap kes untuk mentafsir surat-menyurat yang bertukar tangan di antara pihak-pihak dan untuk mengatakan sama ada atau tidak ia adalah keputusan yang diinginkan oleh pihak-pihak. Jika mahkamah mencapai kesimpulan yang bertentangan, maka terdapat kontrak yang boleh dikuatkuasakan (lihat ms 335C).

(2) Undang-undang memihak kepada pengesahan perjanjian dan bukan kepada pembatalannya (lihat ms 335E–F); *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 diikut.

(3) Mahkamah telah memeriksa kedua-dua surat yang saling diutuskan oleh pihak-pihak, dan tidak mendapati bahawa pihak-pihak berniat bahawa kontrak tidak sempurna sehingga suatu perjanjian jual beli yang rasmi telah dilaksanakan oleh mereka. Sebaliknya, mahkamah mendapati bahawa tujuan objektif mereka adalah berlawanan. Mereka telah mengenal pasti pihak-pihak kepada transaksi tersebut, harta tersebut, harga dan terma yang dianggap perlu dengan cukup jelas. Perjanjian sedemikian adalah dikenali sebagai suatu 'kontrak terbuka'. Ia boleh dikuatkuasakan seolah-olah ia terangkum dalam suatu dokumen dengan penuh takzim. Bagi memberikan kesan kepadanya, undang-undang akan bertindak atas keperluan dan membayangkan terma dalam kontrak jualan supaya ia boleh dilaksanakan (lihat ms 335I dan 336A–C); *Liverpool City Council v Irwin* [1977] AC 239 dan *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300 diikut.

(4) Ungkapan 'tertakluk kepada perjanjian jual beli' yang diharapkan oleh penjual tidak menunjukkan tujuan bahawa tiada kontrak harus wujud sehingga suatu perjanjian jual beli rasmi telah disediakan dan dilaksanakan. Sebaliknya, ia memaparkan tujuan untuk merasmikan perjanjian yang telah pun tercapai antara pihak-pihak apabila dibaca dalam konteks surat-menyurat dan matlamat objektif transaksi tersebut (lihat ms 336E).

(5) Oleh kerana injunksi diberikan setelah kontrak antara penjual dan pembeli diikat, ia tidak mempunyai kesan ke atas transaksi yang telah pun disempurnakan. Selanjutnya, terdapatnya material

A dalam rekod yang diperuntukkan yang menyokong secara munasabah inferens bahawa pembeli sebenarnya adalah pihak ikhlas yang telah mengikat kontrak dengan penjual tanpa apa-apa notis tentang transaksi yang dikatakan atas dasar mana injunksi telah diperolehi. Dalam keadaan ini, tidak terdapat halangan kepada permohonan oleh penjual agar injunksi dibubarkan supaya jualan kepada pembeli boleh diteruskan tanpa sebarang kelewatan selanjutnya (lihat ms 336G).]

Notes

For cases on frustration of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1604–1620.

For cases on formation of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600.

Cases referred to

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] 129 CLR 99

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754

Hillas & Co v Arcos Ltd [1932] All ER Rep 494

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108

Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39

Liverpool City Council v Irwin [1977] AC 239

Masters v Cameron (1954) 91 CLR 353

Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai [1986] 3 SCC 300

Appeal from: Originating Summons No 24–1016–92 (High Court, Ipoh)

Cecil Abraham (*James Devadason* with him) (*Maxwell Kenion Cowdy & Jones*) for the appellant.

Mah Weng Kwai (*Hira Singh* and *T Gunaseelan* with him) (*Mah Weng Kwai & Associates*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal raises a short point which has arisen on numerous occasions and upon which there are several decisions of the highest judicial tribunal in this country. But for the very special circumstances of this case, to which we will refer in due course, we would have been disinclined to add to the volume of legal literature already in existence upon the subject.

The facts relevant to this appeal are as follows.

The appellant was the registered proprietor of two shophouses ('the shophouses') along Jalan Station, Ipoh. He wanted to sell the shophouses. He engaged the services of a firm of estate agents, Messrs Muthu & Lee, to find a buyer. The asking price was RM450,000. In November 1989, the estate agents found a buyer in the person of the respondent who was prepared to pay that sum. They then communicated with the appellant's solicitors who, on 23 November 1989, wrote the following letter to Messrs Muthu & Lee:

> We refer to the telephone conversation between your Mr ES Muthu and our Miss J Devadason of even date.
>
> Your client's offer of RM450,000 for the purchase of the above-mentioned property is accepted on the condition that a 10% deposit is paid to us on 28 November 1989 by 12pm, and the balance purchase price to be paid to us within three months from execution of the agreement upon which vacant possession of the property will be given to your client.
>
> We confirm that our clients have agreed to pay your commission of 1%.
>
> Kindly be informed time is of the essence. This transaction shall lapse should we not receive a deposit of 10% of the purchase price by 28 November 1989 by 12pm.

The estate agents responded by their letter of 28 November 1989 as follows:

> We refer to your letter JMD/LKH/41091 dated 23 November 1989.
>
> 2 We hereby confirm our client Mr Lau Wing Hong IC No 4405270 of No 26, Jalan Datoh Ipoh offer to purchase the above property at RM450,000 (Ringgit: Four Hundred and Fifty Thousand Only) and enclose herewith the 10% vide MBB Cheque No 660088 as deposit subject to the sale and purchase agreement.
>
> 3 Whereas the balance of the purchase price will be paid within three months from the date of the execution of the agreement with vacant possession. All quit rent and assessment will be apportioned as at date of transfer.

A day later, that is to say, on 29 November 1989, one Gurbachan Singh, Kartar Singh and Teja Singh caused to be issued a writ from the Ipoh High Court against the firm of Messrs Muthu & Lee and the present appellant seeking, inter alia, specific performance of an agreement made on either 24 November 1989 or 26 November 1989 for the sale of the shophouses to them. On the same date as the writ was issued, these three gentlemen obtained an ex parte injunction restraining the appellant from entering into any agreement for the sale of the shophouses in question to any other person. This injunction was served on the appellant on 30 November 1989. The appellant then took the position that the agreement it had with the respondent, if any, had been rendered impossible of performance, and informed the respondent accordingly.

Later, in January 1992, the appellant unsuccessfully applied to have the writ struck out for want of prosecution and to have the injunction

against it set aside. On 29 October 1994, the appellant took out a summons claiming a declaration to the effect that if there was an agreement between it and the respondent, then, such agreement had been frustrated by the grant of the injunction. The learned judge who heard the summons dismissed it, but gave no reasons for his decision. Against this decision, the appellant appealed to this court. We heard the appeal on 17 September 1996, and dismissed it without calling upon counsel for the respondent.

Mr Abraham of counsel for the appellant, in his opening address to us, identified the two issues that lie at the heart of this appeal. First, whether there was a valid and enforceable agreement between the parties to the appeal. Second, if there was such an agreement, then, whether that agreement had been frustrated by the grant of the injunction in question. Counsel urged that both issues should be resolved in the appellant's favour.

However, it was quite properly conceded by Mr Abraham that if the first issue was resolved in the respondent's favour, no question of frustration could arise since a valid and enforceable agreement would — having regard to the chronology of events — have come into existence not later than 28 November 1989. The injunction, having come after the conclusion of the contract, there was nothing upon which it could bite.

It was submitted on the appellant's behalf that there was no contract concluded between the parties. Mr Abraham argued that the agreement to sell was subject to contract. He drew our attention to the phrase 'subject to the sale and purchase agreement' appearing in the estate agents' letter of 28 November 1989 which he said showed that the parties were still negotiating. There were, counsel submitted, many terms which the parties had not agreed upon. Some of these may never be agreed when the draft agreement was prepared and exchanged. Upon this premise, so it was said, there was no concluded contract.

In support of his argument, Mr Abraham referred us to the decisions of the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, and to the decision of the former Federal Court in *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39.

Counsel also directed our attention to the following passage (at p 765 of the report) in the judgment of Edgar Joseph Jr SCJ in *Ayer Hitam* for the purpose of identifying the correct test that is to be applied in a case such as the present:

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at pp 288–289 where the court said this:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

In *Branca v Cobarro* [1947] KB 854, the agreement entered into by the parties contained a clause as follows: 'This is a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed.' It was held by the Court of Appeal that a binding agreement had come into effect.

But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v Denny* [1921] 1 Ch 57) or 'subject to the preparation and approval of a formal contract' (see *Winn v Bull* (1877) 7 Ch D 29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to prevent the formation of a contract. (See, for example, *Richards (Michael) Properties Ltd v Corp of Wardens of St Saviour's Parish Southwark* [1975] 2 All ER 416, *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, *Filby v Hounsell* [1896] 2 Ch 737).

We hasten to add, however, that in both *Richards* and *Alpenstow*, the court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time-honoured expression 'subject to contract'. Indeed, in *Chinnock v Ely (Marchioness)* (1865) 4 De GJ & Sm 638, at p 646, Lord Westbury said this:

> '... if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.'

Although the judgment of Edgar Joseph Jr SCJ in *Ayer Hitam* contains all the learning upon the subject, we would, for completeness, refer to the following passage in the joint judgment of Dixon CJ, McTiernan and Kitto JJ, in *Masters v Cameron* (1954) 91 CLR 353:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless

A have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

Unless the approach we have stated is adopted, a party to a contract who — after having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 where he said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

This principle applies not only to documents drafted by laymen, but also to those prepared by lawyers (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99).

We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been

executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.

Dr Geoffrey Cheshire in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:

> If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an *open contract*. When this form of contract is made, the parties are bound by certain obligations implied by the law.

The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalize the agreement already concluded between the parties. We therefore entertain no difficulty whatsoever in rejecting the argument advanced by Mr Abraham upon the first issue.

Since the injunction came after the contract between the appellant and the respondent had been made, it had no effect upon the transaction that had already been concluded. Further, there was material in the record provided that reasonably supports the inference that the respondent was really an innocent party who had entered into a contract with the appellant without any notice whatsoever of the alleged transaction on the basis of which the injunction was obtained. In these circumstances, we see no impediment to an application by the appellant to have the injunction dissolved so that the sale to the respondent may be proceeded without any further delay.

Having dismissed the appeal, we made those orders that are usually consequent upon a dismissal.

Order accordingly.

Reported by Isabel Liong